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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G. M. ATKINSON AND E. D. ATKINSON, INDIVIDUALS, D/B/A LAZY LE CATTLE CO. AND D/B/A ATKINSON CATTLE CO., AND VIVIAN ATKINSON, AN INDIVIDUAL,

Petitioners,

v.

ANADARKO BANK & TRUST CO., A STATE BANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a civil claim for treble damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO") requires that the "Enterprise" be made up of individuals or entities totally separate and distinct from the Defendant and its officers.

2. Whether a civil claim for treble damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO") requires that the Defendant and the "Enterprise" consisting of an association-in-fact must be made up of individuals or entities and associated in a manner apart from the activities of the Defendant to afford Plaintiff a right to recovery.

PARTIES TO THE ACTION

Petitioners are G.M. ATKINSON and E.D. ATKINSON, individuals, d/b/a LAZY LE CATTLE CO. and d/b/a ATKINSON CATTLE CO., and VIVIAN ATKINSON, an individual. There are no other affilitates or subsidiaries of Petitioners. The affiliates of ANADARKO BANK & TRUST CO., an Oklahoma State Bank, to the extent they are known to Petitioners are contained in the Appendix pursuant to Rule 28.1 of the Supreme Court of the United States (App. A-39).

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Petitioners G. M. Atkinson and E. D. Atkinson, individuals, d/b/a Lazy Le Cattle Co. and d/b/a Atkinson Cattle Co., and Vivian Atkinson, an individual, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered January 28, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 808 F.2d 438. The opinion of the District Court for the Northern District of Texas is contained in the Appendix (App. A-35).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 28, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Racketeer Influenced And Corrupt Organizations Act ("RICO"), Title IX of the Organized Crime Control Act of 1970, as amended, 18 U.S.C. §§ 1961-1968 are contained in the Appendix (App. A-1 to A-12).

STATEMENT OF THE CASE

Petitioners filed this action in May of 1984 alleging Anadarko Bank & Trust co. ("Anadarko"), the Defendant below, while conducting an enterprise through an association-in-fact of Anadarko Bank & Trust Co., Anadarko BankShares, Inc., the holding company for Anadarko and E. Glen Price, James Decker and Calvin Campbell, officers of Anadarko, wherein Anadarko defrauded Petitioners by charging excessive interest rates due to the improper calculation of Anadarko's prime rate and by artificially inflating Petitioners' claimed balance by the improper calculation of per annum interest on the basis of a 360 day year. The federal claims were based on Section 1962(c) of RICO. Specifically, Petitioners asserted RICO claims under two alternative theories: (1) Anardarko violated RICO by using the mail for the delivery and receipt of notices of changes in interest rates and payments of interest and principal by Petitioners — the borrowers and (2) Anadarko violated RICO through the use of the mail for the delivery and receipt of notices of claimed interest and principal claimed due from Petitioners which was artificially inflated by use of the computation trick of figuring per diem interest on the basis of a year containing 360 days and applying that figure to the number of days outstanding on the loan — 365 days or 366 days in the case of leap year. Petitioners sought "treble damages and attorneys fees suffered by reason of the excessive interest charged and in many instances paid by Petitioners to Anadarko."

Petitioners filed their Amended Complaint on January 13, 1986, the case was reached for trial and a jury returned a verdict favorable to Petitioners on January 22, 1986, awarding damages in the amount of $2,899,796.63 before trebling on the Civil RICO claims and also found common law fraud and breach of contract. The Trial Court granted a judgment notwithstanding the verdict on February 12, 1986, holding that "Petitioners did not establish that Anadarko Bank, its holding company, Anadarko BankShares, Inc., and three bank employees — E. Glen Price, Calvin Campbell, and James Decker — constituted an enterprise separate and distinct from the

bank itself. On January 28, 1987, the district court's decision was affirmed by the Court of Appeals for the Fifth Circuit, which held that there was no evidence of an "association-in-fact enterprise" under 18 U.S.C. § 1961(4) and that there was no "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit . . ." the Court of Appeals held that there was no evidence that "the bank, its holding company, and three employees were associated in any manner apart from the activities of the bank."

The Fifth Circuit's analysis is directly contrary to the Eleventh Circuit's decision, although in the minority, holding that the Defendant can constitute the enterprise under § 1962(c) in *U.S.* v. *Hartley*, 678 F.2d at 988 and is contrary to the 9th Circuit's analysis in *United States* v. *Benny*, U.S.C.A. (9th Cir. 1985) 786 F.2d 1410.

The Courts' narrowing application of the RICO enterprise is contrary to Congress' mandate that the act be liberally construed to effectuate its remedial purpose.

REASONS FOR GRANTING THE WRIT

In a context of widespread controversy which seems to proliferate daily and federal lawsuits which invoke a statute for common-place commercial disputes, this case presents issues concerning fundamental policies of national jurisprudence. A decided majority of the Courts' confronting the question of the scope of RICO originally concluded that the purpose and design of the statute address the interference or infiltration of commerce by the criminal elements and continue to judicially impose constraints upon the plain meaning of the Civil RICO Act which are not contained in the act-notwithstanding the Supreme Court's admonitions that any such constraints are not the function of the Courts but are reserved for Congress. The cases depart from circuit to circuit on whether the plain language of the statute permits an interpretation consistent with its purpose, in contrast to broadly expanding its provisions to include many transactions previously considered garden variety commercial fraud cases. This case presents another judicially imposed limitation not contained in the Act.

The Fifth Circuit, as have other circuits, concluded that the statute must be liberally construed, at least in part,[1] so as to afford a claim for treble damages and attorneys' fees whenever a defendant does no more than twice violate one or more in a litany of offenses ranging from securities laws to murder. The Courts, notwithstanding the *Sedima, S.P.R.L.* v. *Imrex Co.*, U.S. , 105 S.Ct. 3275 (1985) and *Haroco, Inc.* v. *American National Bank and Trust Co.*, 747 F.2d 384 (7th Cir. 1984) aff'd U.S. , 105 S.Ct. 3291 (1985) still approach a civil RICO claim with judicial hostility as evidenced by continued efforts to impose limitations and restraints not contained in the Act.

The Supreme Court has also concluded that the statute must be liberally construed. As indicated in *Sedima, supra*, and *Haroco, supra*, the paramount issue is whether courts are charged with applying the statute whenever the literal language allows results consonant with its purpose. In conflict with the Eleventh and Ninth Circuits and the Supreme Court,

[1] R.A.G.S. *Couture, Inc.* v. *Hyatt*, 774 F.2d 1350.

the Fifth Circuit chose to reject the liberal construction of the statute to enforce its remedial purpose for the sake of another attempt to limit or circumvent the literal meaning of the statute when it impacts on some (financial) institution as opposed to a defendant not a recognized member of the establishment even though the two defendants engage in identical behavior. This type of disparate interpretation of and application of the statute has to stop somewhere.

The foregoing conflict between the circuits and in light of this Court's prior rulings on other aspects of the statute posits extraordinary considerations for this Court. First, the issues are not isolated but have occurred, are occurring and promise to occur with increasing frequency throughout the nation. Second, further development by future decisions in other circuits is unlikely to yield any greater insight or analysis than the polar positions expressed in the Fifth, Seventh, Eleventh and Ninth Circuits. Third, to countenance the Trial Court and Circuit Court's ruling in this case is to state that criminal activity is approved behavior so long as it is conducted by bank employees, the bank and its holding company and that they are not associated in any manner apart from the activities of the bank — even though a jury finds them guilty of obtaining money and property through false and fraudulent pretenses by use of the mails. The limitations of civil RICO, not expressly contained in the act are limited to Congress not the Courts. The mere fact that bank officials, the bank and its holding company engage in proscribed conduct should not shield them from liability simply because they are not considered non-members of the establishment.

Accordingly, to avoid a continuation of inconsistent applications and interpretations of RICO on these issues by the lower federal courts resulting in incongruous decisions affecting substantial numbers of litigants, this Court should grant review of this case to determine whether the Fifth Circuit erred in holding that Petitioners failed to prove the existence of an "enterprise" of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit and specifically in holding that although the jury

found the Defendant guilty of mail fraud since it and the other members of the enterprise were engaged in no manner separate and apart from the activities of the bank, the complained of activity which was otherwise unlawful is condoned and thereby legitimized.

I. The Decisions of the Fifth Circuit and the Eleventh and Ninth Circuit Directly Conflict

The Fifth Circuit's decision in this case directly disavows the Eleventh Circuit's decision in *U.S.* v. *Hartley, supra,* and *U.S.* v. *Benny, supra,* analysis and reasoning. In so doing, the Fifth Circuit expressly rejected the Eleventh Circuit's reasoning that the culpable person and the enterprise could be the same entity or person and further reject the similar reasoning in *U.S.* v. *Benny, supra.*

The Supreme Court, when the issue has reached it, has continually opted for the liberal construction of RICO, held to its literal reading and reserved any restraint on RICO for congressional action — not judicial.

The Seventh Circuit, as affirmed by the Supreme Court, in *Haroco* v. *American National Bank, et al., supra,* concluded that a RICO Plaintiffs' injury arises only by reason of the underlying predicate acts, which were stipulated in this case if multiple mailings were proved — as they were — of false statements entitles a person to sue for treble damages under RICO if he has suffered an injury "by reason of a violation of Section 1961".

In the case at bar, a pervasive scheme to defraud Petitioners and other borrowers of Anadarko existed so that an enterprise's activities were actually being conducted through a pattern of racketeering activity. The jury so found and the Courts disregarded those findings — notwithstanding the proof and reasonable inferences therefrom. There is no dispute that Anadarko continually charged the higher "local prime" to Petitioners rather than the lower "national prime" contracted for and never disclosed same to Petitioners. Furthermore, Anadarko's notes called for interest at per annum or annual

rates at claimed specified percentages which were always figured on the basis of a 360 day year which, although undisclosed, artificially inflated the same. The mere identity of respondents or their purported standing in the community, if not hardened criminals but nonetheless engage in proscribed behavior cannot be exempt from the penalties of the Act. In short, no matter how respondents may be identified, if respondent, whether known criminal or banker complies with the law neither has anything to fear of Civil RICO. Why should identity in the community alone exempt one from culpability for acts which transgress Civil RICO? This case if allowed to stand supports such artificial reasoning and circumvents the statute.

II. The Issue Involves The Requisite Public Importance To Litigants And Courts Throughout The Nation

The type of injury required under RICO is one which is continually being confronted by federal courts throughout this country. As the Seventh Circuit noted in *Haroco, supra,* those decisions appear equally divided. The decision of *U.S.* v. *Hawes,* U.S.C.A. (5th Cir. 1976) 529 F.2d 472; *U.S.* v. *Turkette,* 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); *U.S.* v. *Elliott,* 571 F.2d 880 (5th Cir. — cert. denied) 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978); *U.S.* v. *Welch,* 656 F.2d 1039 (5th Cir. 1981) and *U.S.* v. *Thevis,* (5th Cir. 1982), 665 F.2d 616, upon close examination do not support the position of the bank nor the Fifth Circuit in this case.

It is superfluous to labor the obvious consequences of inconsistent results in Civil RICO cases. However, the forum shopping which this conflict will encourage is especially significant in RICO claims founded on (1) "the collection of an unlawful debt", or (2) "obtaining money and property by false and fraudulent pretenses" and (3) the federal securities laws. The broad venue provision contained in the Securities Exchange Act of 1934 and the similarly broad provision in Civil RICO permitting venue "in any district . . . . wherein the Defendant is found or is an inhabitant or transacts business", exposes a party, Plaintiff or Defendant, with nationwide facilities to inevitable litigation in districts favoring the broader

definition or interpretation of "enterprise" and in litigation such as the Atkinson case petitioner is to be deprived of recovery solely on definitional criteria simply because the case was tried in the Fifth Circuit as opposed to the Eleventh or Ninth Circuits.

Furthermore, the influx of RICO lawsuits has not and will not subside with the continuing lure of treble damages and attorneys fees to be sure and one uncertainty to litigants by virtue of the conflict of the Circuits demands action. This influx of cases commands the intercession of this Court in order for both sides Plaintiff and Defendant, to still the confusion and inconsistent treatment which has continued and will continue unless this Court grants Certiorari and resolves this issue.

Petitioners further submit that it is imperative for this Court to now take the next logical step in RICO jurisprudence and decide the issue of what is involved in the definition and proof of the RICO enterprise, particularly as it relates to recovery on a Civil RICO claim. Petitioners urge that this Court must decide this issue of the RICO enterprise within a context that includes this case. As noted there are conflicts and uncertainty in this area of RICO jurisprudence. Not only Petitioners but the nation are in need of guidance — both Plaintiffs and Defendants.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

18 U.S.C. §§ 1961-1968

§1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year, (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving

bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of

ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not

confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the

court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determi-

nation thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court

is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause action to be expedited in every way.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative

demand requiring such person to produce such material for examination.

(b) Each such demand shall —

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall —

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violations.

(d) Service of any such demand or any petition filed under this section may be made upon a person by —

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such persons, or upon any individual person;

(2) delivering a duly executed copy thereof to the

principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as a racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced

such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of —

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return

of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly —

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or

transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter each order or orders as may be required to carry into effect the provisions of this section.

In the

United States District Court

Northern District of Texas, Amarillo Division

G. M. ATKINSON AND E. D. ATKINSON, INDIVIDUALS, D/B/A LAZY LE CATTLE CO. AND D/B/A ATKINSON CATTLE CO., AND VIVIAN ATKINSON, AN INDIVIDUAL,	§	
Plaintiffs,	§	CIVIL ACTION NO.
vs.	§	CA-2-84-0082
ANADARKO BANK & TRUST CO., A STATE BANK,	§	
Defendant.	§	

AMENDED COMPLAINT AND JURY DEMAND

COMES NOW, G. M. Atkinson and E.D. Atkinson, individuals, d/b/a Lazy Le Cattle Co. and d/b/a Atkinson Cattle Co., and Vivian Atkinson, an individual ("ATKINSON"), Plaintiffs in the above entitled and numbered cause, complaining of Anadarko Bank and Trust Co., an Oklahoma State Bank ("ANADARKO"), with it's principal place of business at 110 W. Oklahoma, Anadarko, Oklahoma, and for cause of action would show the Court the following:

JURISDICTION AND VENUE

I

Jurisdiction of this cause is founded on Section 1964 of the Racketeer Influenced and Corrupt Organizations Act [18 USC, Sec. 1964] ("RICO"), in that violations of said Act are alleged and further, on the principals of pendent jurisdiction. Venue is appropriate in this district because the majority of all acts and transactions constituting violations of said acts complained of and the property in question is located in said district and division, to-wit: Dalhart, Dallam County, Texas.

Jurisdiction of this Court over said claims is conferred by 28 USC, Sec. 1331, 1337, 18 USC, Sec. 1964 and the pendent jurisdiction of this Court. There is also diversity of citizenship of the parties supporting jurisdiction. The matter in controversy exceeds, exclusive of interest and cost the sum of Ten Thousand Dollars ($10,000.00).

As more fully described below, Defendant and others have conspired to and did conduct and participate in the conduct of the affairs of an "enterprise", an association in fact of E. Glen Price, Calvin Campbell, James Decker, Anadarko Bankshares, Inc., the Defendants holding company, and ANADARKO, through the collection of "unlawful debt" and/or obtaining money and interest by false and fraudulent pretenses from Plaintiff in the year 1981 through the present, in violations of the provisions of both RICO and State Common Law.

II.

The unlawful acts and violations set forth were carried out by the Defendant and made and effected within the Northern District of Texas, Amarillo Division.

PARTIES IN VENUE

I.

Plaintiffs, ATKINSON, individuals, are residents of

Dalhart, Dallam County, Texas. In the course of his personal business, Plaintiffs previously borrowed money from the Defendant, ANADARKO, and have been injured by reason of the violations of the law alleged herein.

II.

Defendant ANADARKO is an Oklahoma State Bank, organized and existing under the laws of the State of Oklahoma and has it's principal place of business in Anadarko, Oklahoma. Defendant ANADARKO and E. Glen Price, Calvin Campbell, James Decker and Anadarko Bankshares, Inc., a corporation, an association in fact, are an enterprise which is engaged in and whose activities affect interstate commerce.

III.

Venue is properly laid in the Northern District of Texas, Amarillo Division, pursuant to 28 USC, Sec. 1391(e) and 18 USC, Sec. 1965(a).

Plaintiffs became borrowers of the Defendant by obtaining loans, numbers 5592 and 5594 in the amount of approximately One Million One Hundred Twenty One Thousand Sixty-eight Dollars and 56/100 ($1,121,068.56) with the interest rate purportedly computed at 14.75%. A copy of said Notes are hereto marked Exhibits "A" and "B" attached hereto as though set out in full. The proceeds of these Notes were payable for use in the operation of buying, selling, feeding cattle and operating Plaintiffs' ranches. Contemporaneous with the execution of the adjustable or floating loan Notes, Exhibits "A" and "B", Plaintiffs also were required to execute certain Deeds of Trust on the subject properties attached hereto and made a part hereof as though set out in full, marked Exhibits "C" and "D". The alleged result of the execution of Exhibits "C" and "D" was to secure the advance of funds to ATKINSON. Upon the execution of said Notes and the pledging of properties as security, ATKINSON owed approximately $1,300,000.00 and had an equity ownership in ATKINSON'S property and cattle operation of approximately $3,500,000.00.

IV.

Pursuant to the Notes and Deeds of Trust (incorporating by express reference to the terms of the Note and Deed of Trust) the parties purportedly agreed that the Plaintiff would be charged interest at the rate of prime + 2% per annum, in which said loans prime means that rate of interest charged the bank's biggest and best corporate borrowers on ninety (90) day unsecured commercial loans or maturities. The rate charged Plaintiffs was an artificially posted rate, it is believed; and not the rate charged the bank's biggest and best corporate customers on ninety (90) day unsecured commercial loans or maturities. It was further agreed that interest would be calculated on the basis of actual days outstanding as calculated on a 365 day year by use of the term "per annum" and/or "annual."

V.

Plaintiffs were instead charged and paid interest at a higher rate than the rates agreed upon as hereinafter more fully appears. The claims of Plaintiffs involve certain question of fact including but not limited to the following:

A. Whether ANADARKO in conducting the affairs of the enterprise charged Plaintiffs interest based upon a 365 day year in accordance with their Loan Agreement or a 360 day year;

B. Whether ANADARKO in conducting the affairs of the enterprise obtained interest and/or alleged principal from Plaintiffs by false and fradulent pretenses;

C. Whether ANADARKO in conducting the affairs of the enterprise knowingly concealed from Plaintiffs the true rate it charged them;

D. Whether ANADARKO in conducting the affairs of the enterprise knowingly charged interest and allegedly principal on an unlawful debt in violation of state law; and,

E. Whether ANADARKO in conducting the affairs of the enterprise knowingly charged interest and/or principal, whichever, which said principal in fact constitutes interest, in

excess of two (2) times the permissable rate and attempted to collect unlawful debts.

VI.

Additional questions of law which predominate this action but are not limited thereto are the following:

A. Whether the interest ANADARKO, in conducting the affairs of the enterprise, knowingly charged and received from Plaintiffs was in excess of the amount agreed upon and fixed by his Loan Agreement and Notes and, therefore, is in violation of the State and/or Federal Banking Laws and the maximum permissable charge under V.A.T.S., Article 5069-1.06 and/or 5069-8.01; or applicable Oklahoma law, whichever;

B. Whether in conducting the affairs of the enterprise ANADARKO's knowing concealment of the true rate of interest in effect, by any two (2) acts of mail fraud authorized, ordered or done by it's officers, agents, employees or representatives, constituted a pattern of racketeering activity through which it and it's subsidiaries, satellite or affiliate offices, were conducting affairs in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 USC, Sec. 1962;

C. Whether ANADARKO breached it's Loan Agreement by charging Plaintiffs interest at a higher rate than the rate agreed upon;

D. Whether ANADARKO committed fraud by virtue of it's repeated misrepresentations that the rate of interest charged Plaintiffs was based upon a 365 day year;

E. Whether ANADARKO committed fraud by virtue of it's repeated misrepresentations that One Million One Hundred Twenty-one Thousand Sixty-eight Dollars and 56/100 ($1,121,068.56) was in fact owed to ANADARKO in the financing and re-finance of certain loans;

F. Whether ANADARKO committed fraud by virtue of it's repeated misrepresentations that the stated per annum interest charged Plaintiffs was computed on a calendar year

"per annum" of 365 days when in actuality ANADARKO used a 360 day calculation which yielded a higher rate of interest;

G. Whether ANADARKO in conducting the affairs of the enterprise attempted to collect an unlawful debt or debts by charging interest in excess of two (2) times the permissable rate by demanding payments from Plaintiffs herein on sums not owed and totally void by Texas or Oklahoma law, whichever, by continuing to accrue interest on a fictitious or artificially created balance; and,

H. Whether ANADARKO in conducting the affairs of the enterprise committed fraud and/or attempted to collect an unlawful debt by clouding the title to the Plaintiffs' ranches by the filing of the Deeds of Trust, Exhibits "C" and "D", in an effort to effectuate a lien in the financing arrangements of the parties in which ANADARKO artificially inflated the alleged balance(s) due in an attempt to collect an unlawful debt or in an effort to obtain interest by false and fraudulent pretenses.

COUNT I.

DEFENDANT'S VIOLATION OF THE LAW BY CHARGING INTEREST HIGHER THAN THE AGREED UPON RATE BY CALCULATING INTEREST ON 360 DAY YEAR

I.

This Count is brought in accordance with 12 USC 1461, et seq.

II.

The averments in the previously numbered paragraphs of this Complaint are incorporated by reference with like effect as if set forth at length herein.

III.

On October 21, 1982, Plaintiffs and ANADARKO for value considered, entered into Promissory Notes and Deeds of Trust, respectively, heretofore attached and marked as Exhibits "A" through "D", wherein and whereby ANADARKO acting in concert with Anadarko Bankshares, Inc., E. Glen Price, Calvin Campbell and James Decker, an association in fact which constitutes an enterprise advanced cash from ANADARKO to Plaintiffs and thereby attempted to encumber their properties on artificially calculated rates by use of computation tricks and balances alleged due charged and incurred pursuant to fraudulent misrepresentations made Plaintiffs to induce them to execute said agreements.

IV.

Pursuant to said Notes for the loans in question, Plaintiffs and ANADARKO purportedly agreed in pertinent part that the alleged specified interest rate on the money borrowed was to be imposed "per annum" meaning 365 days per year and not 360. This exact interest equation, using a 365 day year conversion factor (i.e., the value 365 as the number of days in a year), calls for dividing the specific annual rate of interest by 365, multiplying that figure by the unpaid balance of money borrowed, then further multiplying that result by the number of days in the term of the loan.

V.

During the course of the borrowing relationship from August 25, 1982 through and including the date of filing of this suit, Plaintiffs have paid and accrued to their account(s), substantial amounts of interest on the Notes in question. The interest exacted from Plaintiffs on said Loans in question including the principal which should be treated as interest, exceeded the rate agreed upon by the Plaintiffs. These artificially inflated rates and balances have been obtained by the activities and misrepresentations perpetrated upon Plaintiffs by the Defendant and the association in fact in the conduct of the affairs of the enterprise.

VI.

In contravention of the parties express agreement to use 365 days as the number of days in a year, Defendant ANADARKO in conducting the affairs of the enterprise computed and charged Plaintiffs interest using a 360 day year conversion factor which resulted in Plaintiffs paying more interest in dollars than would have been paid had ANADARKO imposed interest at the agreed upon rate. Under this method of computing interest, the specified rate of interest is divided by the value 360 as the number of days in a year, which figure is multiplied by the unpaid balance of money borrowed, then further multiplied by the number of days in the term of the loan. Interest computed using a 360 day year for a given rate of interest results in exactly 5/360 or 1/72 greater interest than a 360 day year method.

VII.

ANADARKO was, by virtue of V.A.T.S., Article 5069-1.06 and 5069-8.01 and 12 USC 1464, et seq., incorporating the Texas state interest and usury laws, or the applicable Oklahoma statute, whichever, were permitted to charge any rate of interest agreed upon by the Plaintiffs within lawful limits.

VIII.

The Plaintiffs never agreed to pay interest on their loans at rates assessed by Defendant ANADARKO and the association in fact and never agreed to pay interest on unlawful loans consisting of computation tricks and imaginary floating rates of interest described as "FNB OKC Prime" used in such a fashion as to artificially increase the balance alleged due. ANADARKO in conducting the affairs of the enterprise has repeatedly calculated the rate of interest charged as if there were only 360 days in a calendar year, and then fraudulently proceeded to impose that daily rate for a 365 day year, a fact to which ANADARKO has now stipulated and has further pegged interest to a rate that is not specified or a sum certain, allegedly F.N.B. O.K.C. prime.

IX.

In consequence of the foregoing, ANADARKO, in conducting the affairs of the enterprise, took, received and charged a rate of interest greater than that allowed by 12 USC 1464 and V.A.T.S., 5069-1.06 and 5069-8.01 or applicable Oklahoma law, whichever.

X.

By virtue of the premises, Plaintiffs have been damaged in their business and property to the extent of the difference between the interest agreed to be paid and the interest in fact paid.

XI.

WHEREFORE, Plaintiffs demand a judgment:

A. Praying that the Defendant and it's respective officers, directors, agents and employees as well as the enterprise, and all other persons acting or claiming to act thereof or in concert therewith, be perpetually enjoined and restrained from in any manner, directly or indirectly, continuing the unlawful acts hereinbefore alleged;

B. For twice the aggregate amount of interest Plaintiff has paid during the three (3) years next preceding the commencement of this action as well as forfeiture of the entire interest owing in the future;

C. For cost of this suit; and,

D. For such other and further relief as may appear necessary and appropriate.

COUNT II.

ACTION FOR RACKETEERING ACTIVITY BY USING A 360 DAY YEAR IN CALCULATING INTEREST

I.

This Count is brought in accordance with 18 USC, Sec. 1962 and 1964.

II.

The averments of the previously numbered paragraphs of this Complaint are incorporated by reference with lack effect as if fully set out in length herein.

III.

Defendant ANADARKO acting in concert with Anadarko Bankshares, Inc., E. Glen Price, Calvin Campbell and James Decker, an association in fact which is an enterprise, is engaged in and whose activities affect Interstate Commerce.

IV.

Plaintiffs were allegedly indebted to Defendant ANADARKO for certain sums of money upon the Loans in question and they agreed to pay a specific interest rate on a "per annum" or "annual" basis which means a 365 day year.

V.

During the course of dealing between Plaintiffs ATKINSON and ANADARKO, ANADARKO acting by and through it's officers, agents and employees and in concert with Anadarko Bankshares, Inc., an association in fact being an enterprise, and in conducting the affairs of the enterprise, repeatedly and knowingly computed and charged Plaintiffs interest on the Notes and Deeds of Trust in question in excess of the agreed rate of interest.

VI.

The enterprise constituting the association in fact of Anadarko Bankshares, Inc., Price, Campbell, Decker and ANADARKO falsely and fraudulently represented to Plaintiffs that ANADARKO was computing interest on a 365 day year in accordance with the terms of the Promissory Notes and Deeds of Trust, when it is believed that the rate it charged through it's billing statements was in fact greater by virtue of the use of a 360 day year.

VII.

Defendant ANADARKO's failure to disclose, in conducting the affairs of the enterprise, to Plaintiffs and others similarly situated, the interest it actually charged, and it's failure to calculate and charge interest on a 365 day year basis, constituted a scheme to obtain interest from Plaintiffs and others similarly situated by means of false and fraudulent pretenses.

VIII.

Defendant ANADARKO's effort to re-finance the first lien on Plaintiffs properties, it's efforts to cloud the title to said real estate and it's charging of interest and collecting of proceeds and efforts to obtain mortgages on additional properties which were not originally contracted for by the parties constitute a scheme to obtain interest and money from the Plaintiffs by false and fraudulent pretenses.

IX.

Prior to August 1982 and continuing until on or about the date of filing of this suit, or at such other times as may be disclosed in this action, Defendant devised and intended to devise a scheme and artifice to defraud Plaintiffs, and others similarly situated, and to obtain money and property by means of the aforesaid false and fraudulent pretenses, representations and promises, as more particularly set forth hereinabove, well knowing at the time that such pretenses, representations and promises would be false when made and well knowing that it

is unlawful in Texas or Oklahoma, whichever, to charge interest in the method done by Defendant ANADARKO or at a rate in excess of 6% per annum when no agreement existed for a specified rate or a sum certain. Throughout the above stated period of time, Defendant ANADARKO, acting in concert with the enterprise and in conducting the affairs of the enterprise, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, a letter or letters, a statement or statements, duly addressed to Plaintiffs, to be sent or delivered by the post office establishment of the United States. These acts by ANADARKO and the association in fact constitutes mail fraud.

X.

Throughout the entire period of the loan to Plaintiffs ANADARKO, acting in concert with the association in fact, caused statements of loan interest and principal and multiple billing statements which concealed the true account balance or balances and artificially inflated the amount of interest and principal owing, to be sent and delivered by the United States Postal Service to Plaintiff for the purpose of executing the above described scheme; in violation of 18 U.S.C. § 1341 pertaining to mail fraud.

XI.

In consequence of the foregoing and in detrimental reliance thereon, Plaintiffs repeatedly were charged and paid Defendant higher sums of interest than would have been received if the purported agreed upon rate had been charged and if credits had been given Plaintiff and further, in Plaintiffs' detrimental reliance upon representations of the Defendant that Defendant was calculating interest on a 365 day year, when in fact Defendant computing interest on the undisclosed method of 365/360.

XII.

Defendant ANADARKO's failure to disclose its correct interest rate constituted a scheme, while acting in concert with the association in fact, to obtain money and/or interest from Plaintiffs and others similarly situated, which constituted a pattern of racketeering as defined by 18 USC, Sec. 1961 since it involved the regular and systematic use of the mails to repeatedly send false and fraudulent statements for the purpose of receiving payments in violation of 18 USC, Sec. 1341, by false and fraudulent pretenses.

XIII.

As a result of and by reason of the above described racketeering activity through which the said enterprise's (the association-in-fact) affairs were conducted in violation of 18 USC, Sec. 1962, Plaintiffs have been damaged in their business and property to the extent between interest agreed to be paid and the interest, in fact paid, and the interest in fact demanded, including but not limited to alleged principal which constitutes interest on an unenforceable debt.

XIV.

WHEREFORE, Plaintiffs for themselves demand judgment:

A. Praying that the Defendant and it's respective officers, directors, agents, employees and all other persons acting or claiming to act on behalf thereof or in concert therewith, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing in unlawful acts hereinbefore alleged;

B. For three-fold the damages he has sustained in the cost of suit, including reasonable attorneys' fees, pursuant to 18 USC, Sec. 1964(c);

C. For such other and further relief as the Court deems just and proper including reasonable attorneys' fees and costs;

COUNT III.

RICO — CONDUCTING AND CONSPIRING TO CONDUCT THE AFFAIRS OF AN ENTERPRISE TO THE COLLECTION OF AN UNLAWFUL DEBT

I.

The averments of the previously numbered paragraphs of this Complaint are incorporated by reference with like effect as if duly set forth at length herein.

II.

Between, on or about August 1982 and the present time if not before, Defendant has violated 18 USC, Sec. 1962(c) and (d) by conducting and conspiring to conduct the affairs of ANADARKO through the collection of an unlawful debt or debts created pursuant to the Promissory Notes and Deeds of Trust and the purported liens arising thereunder which are unlawful and void.

III.

Plaintiffs have been injured and are threatened with injury to their business or property by reason of Defendant's violations of 18 USC, Sec. 1962(c) and (d) in that (a) since October 21, 1982, Plaintiffs have been required to make payments on an unlawful debt and (b) Plaintiffs have been curtailed in their ability to transact business and to obtain credit by virtue of ANADARKO's attempt to collect an unlawful debt. It is believed that others similarly situated are paying on unlawful debts in the form of notes which are calculated in a similar deceptive fashion to the damage of those others similarly situated. At such time as Plaintiffs have ascertained the exact amount of their damages, they will seek leave to amend this Complaint accordingly. The averments of the previously numbered paragraphs of this Complaint are incorporated by reference with like effect as though set forth herein.

IV.

Plaintiffs continue to make payments for a time under protest upon said unlawful debt to avoid the threat of an attempted foreclosure, although same would be unlawful, which would further damage their reputation and credit.

V.

Plaintiffs have been injured and are threatened with injury to their business or property by reason of Defendant's ongoing violation of 18 USC, Sec. 1962(c) and (d), in that they have been required to continue to make interest payments and purported principal payments which constitute interest on the Notes in question, they have been curtailed in their ability to transact business, have been denied the right to purchase cattle and use feed on hand (one of the principal purposes of the loan), and obtain credit otherwise through the efforts of the Defendant in an attempt to collect an unlawful debt or debts, to their damage for which they herein sue. At such time as the Plaintiffs have ascertained the exact amount of their damages they will seek leave to amend their Complaint accordingly but it is believed that the amount of their damage to date is the principal sum of the loan in question, One Million Two Hundred Thousand Dollars and no/100 ($1,200,000.00) plus all interest paid thereon and charged to them by ANADARKO in the form of a contract for, receipt of or charge of usurious rates of interest.

COUNT IV.

OBTAINING MONEY UNDER FALSE AND FRAUDULENT PRETENSES, CIVIL RICO §1964

I.

The averments of the previously numbered paragraphs of this Amended Complaint are incorporated herein by reference

as though the same were more fully hereinafter set forth at length.

II.

Defendant ANADARKO, Anadarko Bankshares, Inc. and E. Glen Price, Calvin Campbell and James Decker, individuals, as an association in fact are an enterprise which is engaged in and whose activities affect interstate commerce.

III.

Plaintiffs were for several years preceding the filing of this Amended Complaint indebted to the Defendant Bank for certain sums of money, upon which loans they agreed to pay interest based upon a rate that either Defendant ANADARKO or F.N.B. O.K.C., whatever that is, charged its or their "best commercial borrowers" or "best and most creditworthy commercial customers."

IV.

During the relevant periods of time in question, Defendant ANADARKO, in conducting the affairs of the enterprise, knowingly computed and charged Plaintiffs ATKINSON interest on the unpaid balance of their loans at rates greater than the purported agreed upon rate.

V.

During this period of time, Defendant ANADARKO falsely and fraudulently represented to Plaintiffs ATKINSON that the rate charged was based on or tied to the "prime rate" or some "prime rate", i.e. the rate charged either ANADARKO's or F.N.B. O.K.C.'s "best commercial customers" when the rate it in fact charged Plaintiffs was higher than the agreed upon rate.

VI.

Defendant ANADARKO's failure to disclose the rate it

charged or F.N.B. O.K.C. charged its "best commercial borrowers" or "best and most creditworthy commercial customers" and its failure to charge Plaintiffs the agreed upon rate constituted a scheme to obtain interest from Plaintiffs by means of false and fraudulent pretenses. In the alternative, Plaintiffs would show that "F.N.B. O.K.C. prime" is so vague and ambiguous as to constitute no agreement at all as to a "specified rate" or a "sum certain" and the maximum rate chargeable is as a consequence the statutory or constitutional rate of six percent (6%) per annum.

VII.

In consequence of the foregoing and in reliance thereon, to their detriment, Plaintiffs ATKINSON paid and were charged by the Bank interest higher than the agreed upon rate or allowed by law.

VIII.

Defendant ANADARKO's scheme to obtain money from Plaintiffs ATKINSON involved the use of the mails to send false and fraudulent statements to receive payments and, therefore, constituted "Racketeering Activity" as defined in 18 U.S.C. §1961 of Civil RICO, 18 U.S.C. §1961, incorporating 18 U.S.C. §1341 pertaining to mail fraud.

IX.

By virtue of the premises, Plaintiffs ATKINSON under RICO, 18 U.S.C. §1964(c) are entitled to recover triple the difference between the interest Plaintiffs paid or were charged and what Plaintiffs would have paid had the Defendant Bank in fact used the interest rate it imposed to its or F.N.B. O.K.C.'s "best commercial borrowers" or "best and most creditworthy commercial customers", or in the alternative as set by the Constitution and by statute, together with costs of this action and reasonable attorneys fees.

WHEREFORE, Plaintiffs pray for their damages as pled in this Count IV and for such other relief as the Court deems just and proper.

COUNT V.

EXCESSIVE INTEREST CHARGED BY DEFENDANT ON LOAN OF OCTOBER 21, 1982

I.

The averments of the previously numbered paragraphs of this Complaint are incorporated by reference with like effect as if fully set forth herein. This Court has jurisdiction of this Count pursuant to the Doctrine of Pendent Jurisdiction.

II.

The Promissory Notes and Deeds of Trust between ANADARKO and Plaintiffs ATKINSON as subject to the provisions of V.A.T.S. 5069-1.06 and 5069-8.01 providing in relevant part that, when the interest charged exceeds the rate permitted thereunder the Defendant shall be penalized three (3) times the usurious interest charged or in the event of an unlawful charge in excess of two (2) times the permissable rate the Defendant shall forfeit the underlying principal and be penalized the additional sum of two (2) times of all interest charged plus reasonable attorneys' fees.

III.

By virtue of the Notes and Deeds of Trust and the failure of Defendant to properly compute interest and the attempts of the Defendant ANADARKO to collect a void or voidable debt the entire amount of principal constitutes interest and the loan as governed by the laws of the State of Texas or applicable Oklahoma law.

IV.

At all times pertinent to this Complaint, the maximum interest rate charged by the laws of the State of Texas on the loan transaction such as the loan from ANADARKO was 13% per annum. However, the additional sums over and above the original balance of the loan have been charged by use of com-

putation tricks and using Plaintiffs' money by Defendant ANADARKO and not properly and timely crediting same to Plaintiffs' account, in effect riding the float.

V.

At all times pertinent to this Complaint, the maximum interest was exceeded in excess of two (2) times by the Defendant ANADARKO.

VI.

The rate actually charged Plaintiffs under the agreement of October 21, 1982 and following, was substantially in excess of the maximum rate permitted by the laws of the State of Texas or Oklahoma, whichever.

VII.

The total amount of interest paid by or accrued by the Plaintiffs at the excessive rate on the 14th day of May, 1984 was approximately One Hundred Fifty Thousand ($150,000.00). When the precise amount is determined Plaintiffs will seek leave to amend and insert the correct figure.

COUNT VI.

COMMON LAW FRAUD

I.

Plaintiffs would show that the averments in the previously numbered paragraphs of this Amended Complaint are incorporated herein by reference thereto as though the same were more fully hereinafter set forth at length.

II.

Plaintiffs would show that the facts contained in the preceding paragraphs constitute fraud, that the representations made by Defendant at the time Plaintiffs were signing the notes and agreements in question were executed upon the representations that interest would be charged at a rate tied to the "prime rate" as hereinbefore defined, that interest would be calculated on a "per annum" basis and the financing arrangement between the parties would last for a period of at least five (5) years. These representations made by Defendant and its representatives were false when made, they were known by Defendants to be false and were made for the purpose of inducing Plaintiffs to execute the documents in question. These false representations were relied upon by Plaintiffs to their detriment who had no reason to doubt said representations, and their reliance on said false representations resulted in actual damages sustained within the minimum jurisdictional limits of the Court and exemplary damages of Three Million Dollars ($3,000,000.00) for which they herein sue for such fraud against the Defendant.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and judgment as follows:

1. That the Defendant be adjudged and declared to have violated 18 USC, Sec. 1962 and V.A.T.S., Article 5069-1.06 and 5069-8.01 or applicable Oklahoma law, whichever;

2. That the actual damage to Plaintiffs' business or property resulting from the Defendants violation shall be determined;

3. That Plaintiffs be awarded judgment against the Defendant for three (3) times the amount of his actual damages in accordance with the provisions of 18 USC, Sec. 1964(c);

4. That the Plaintiffs be awarded judgment against the Defendant ANADARKO for twice the amount of interest paid to it, for forfeiture of all principal and for reasonable attorneys' fee;

5. That the entire interest for such loan carries with it or which has been agreed to be paid thereon be declared a forfeiture;

6. That the Defendant, it's respective officers, directors, agents and employees and all other persons acting or claiming to act on behalf thereof or in concert therewith, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing the unlawful acts, practices, breach of contract, misrepresentations, omissions, subtrofuges and other devices hereinbefore alleged;

7. That the Loans in question including the Deeds of Trust executed in conjunction therewith be declared not in default but paid in full and the Deeds of Trust ordered released;

8. That the Defendant be enjoined from declaring the loan in default, from accelerating the alleged debt which is indeed void or voidable;

9. That the Plaintiff's be awarded their cost in maintaining this action, including reasonable attorneys' fees as provided in 18 USC, Sec. 1964(c) and the State Usury Laws;

10. That Plaintiffs recover actual damages determined by the jury;

11. That Plaintiffs recover exemplary damages of Three Million Dollars; and,

12. That Plaintiffs be awarded such other and further relief as the nature of the case requires and as to which the Court may deem just and proper.

Respectfully submitted,

Law Offices of Philip R. Russ
1005 Texas American Bank
P.O. Box 12073
Amarillo, TX 79101

Philip R. Russ, Of Counsel
Bar #17406000

JURY DEMAND

Pursuant to Rule 38, Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury.

Philip R. Russ

In the

United States District Court

For The Northern District of Texas, Amarillo Division

G. M. ATKINSON AND E. D. ATKINSON, INDIVIDUALS, D/B/A LAZY LE CATTLE CO. AND D/B/A ATKINSON CATTLE CO., AND VIVIAN ATKINSON, AN INDIVIDUAL,	§	CIVIL ACTION NO.
Plaintiffs,	§	CA-2-84-0082
vs.	§	
ANADARKO BANK & TRUST CO., A STATE BANK,	§	
Defendant.	§	

MEMORANDUM OPINION

The above case was tried to a jury on theories of a violation of RICO, breach of contract, and common law fraud. The defendant cross-claimed for judgment on its notes and foreclosure of its liens. The jury returned a verdict for the Plaintiffs. Before the Court is Defendant's Motion for Judgment Notwithstanding the Verdict. After consideration of the parties' respective motions for judgment and the briefs supporting them, the Court has reached the following conclusions.

1. The evidence supports a jury finding that Anadarko Bank breached the contract in question by using the local prime rate rather than the national prime rate to compute the interest on the promissory notes. Plaintiffs are entitled to damages on its breach of contract theory in the amount of $18,100.83, to be offset against the amount due on the promissory notes.

2. The evidence supports the jury finding of common law fraud based on representations that the national prime rate rather than the local prime rate would be used. The damages on the fraud claim are the same as the damages for breach of contract, that is, the difference between the interest computed at the local and national prime rates. A plaintiff cannot recover the same damages twice, even though the recovery is based on different theories. *Alcorn County, Miss.* v. *U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1171 (5th Cir. 1984).

3. The evidence does not support the jury's finding that Anadarko Bank, Anadarko Bankshares, Inc., E. Glen Price, Calvin Campbell and James Decker were an enterprise separate and distinct from Anadarko Bank.

Plaintiffs do not contend that the alleged enterprise was a structured legal entity. Rather they contend that the enterprise was an association in fact. See 18 U.S.C. § 1961(4). The alleged enterprise does not meet the standard set forth in *United States* v. *Turkette*, 452 U.S. 574, 584, 101 S.Ct. 2524, 2528. In *Turkette*, the Supreme Court held that the Plaintiff must present "evidence of an ongoing organization, formal or informal, and . . . that the various associates function as a continuing unit" to prove the existence of a RICO enterprise. *Id.* Further, the enterprise must be an entity separate and apart from the activity in which it engages. *Id.*

No evidence was presented that the three individual employees of the bank, the bank, and the bank holding company are associated in any manner apart from the activities of the bank. No connection was shown between the three individuals and the holding company. The only evidence concerning the holding company was a document indicating the holding company had purchased shares of the Plaintiffs' note from the bank. Further, Plaintiffs presented no evidence that the alleged associates function as a continuing unit or are an ongoing association. Indeed, there was no evidence that the associates formed any kind of a unit at all. The alleged racketeering activity (mail fraud in mailing statements requesting payment of interest in excess of the agreed amount) was an activity of the

bank. There is no evidence of any other activity on the part of the alleged enterprise.

The existence of an enterprise is an essential element of a RICO claim. *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. , 105 S.Ct. 3275, 3285 (1985). Hence, Plaintiffs cannot prevail on their RICO claim.

5. Even if the evidence were sufficient to support a recovery under RICO, Plaintiffs could not recover the damages found by the jury in response to Special Issue No. 22. In Special Issue No. 22, the jury found that Plaintiffs were injured in their business or property in the amount of $2,899,796.63 because of Anadarko's violation of 18 U.S.C. 1962(c).

The answer to Special Issue No. 22 is not supported by the evidence. Recoverable damages to Plaintiffs' business and property must arise from the commission of the predicate acts sufficiently related to constitute a pattern. *Sedima*, 105 S.Ct. at 3286. The damages from the mail fraud, i.e., the mailing of requests for interest calculated in an improper amount, are $18,100.83. There is no evidence showing any other injury to Plaintiffs' business or property proximately caused by defendant's engagement in a pattern of racketeering activity. See *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984) *aff'd* 105 S.Ct. 329 (1985). Further, Plaintiffs' complaint sought only "triple the difference between the interest plaintiffs paid or were charged and what plaintiffs would have paid . . . ." Even assuming a RICO violation, Plaintiffs' damages would be limited to triple $18,100.83 because there is no evidence of an injury to Plaintiffs' property or business *proximately caused by the RICO violation* in excess of the difference between interest calculated by computation at the national and local prime rates.

6. Defendants are entitled to a judgment in the amount of $1,064,546.23 and foreclosure of its liens on the counterclaim. This sum represents the amount due on the notes computed by the use of the national prime rate. This method of computation has the effect of incorporating offsets to which Plaintiffs are entitled.

7. Plaintiffs are not entitled to recover attorneys' fees. The note provides that Oklahoma law is to govern the construction of the note. Hence, attorneys' fees are not recoverable for the breach of contract or common law fraud causes of action. See *OKLA. STAT.* tit. 12 § 936.

8. Defendants are entitled to recover attorneys' fees in the amount of $55,797.96 incurred in the collection of the note. *OKLA. STAT.* tit. 15 § 276.

9. Except for attorneys' fees, each party shall bear its own costs.

ENTERED this 12th day of February, 1986.

MARY LOU ROBINSON
United States District Judge

LIST OF PETITIONERS' PARENTS, SUBSIDIARIES AND AFFILIATES

G. M. Atkinson, an individual and E. D. Atkinson, an individual, d/b/a Lazy Le Cattle Co. and Atkinson Cattle Co. and Vivian Atkinson, an individual, are Petitioners. There are no other known parents, affiliates or subsidiaries.

86 1800

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G. M. ATKINSON AND E. D. ATKINSON, INDIVIDUALS, D/B/A LAZY LE CATTLE CO. AND D/B/A ATKINSON CATTLE CO., AND VIVIAN ATKINSON, AN INDIVIDUAL,

Petitioners,

v.

ANADARKO BANK & TRUST CO., A STATE BANK,

Respondent.

SUPPLEMENTAL APPENDIX

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Attorneys for Petitioners

808 FEDERAL REPORTER, 2d SERIES, 438

G.M. ATKINSON and E.D. Atkinson, Individuals, d/b/a Lazy Le Cattle Company, and d/b/a Atkinson Cattle Company, and Vivian Atkinson, an Individual, Plaintiffs-Appellants,

v.

ANADARKO BANK AND TRUST COMPANY, a State Bank, Defendant-Appellee.

No. 86-1116.

United States Court of Appeals, Fifth Circuit.
Jan. 28, 1987.

Debtors brought action against creditor alleging violation of Racketeer Influenced and Corrupt Organizations Act and alleging breach of contract and commonlaw fraud. The United States District Court for the Northern District of Texas, Amarillo, Mary Lou Robinson, J., granted judgment notwithstanding the verdict in regard to finding RICO violation, leaving intact jury findings of common-law fraud and breach of contract, and offset interest overcharge against amount due creditor on loans made to plaintiffs. Plaintiffs appealed. The Court of Appeals held that: (1) bank, its holding company, and three employees were not associated in any manner apart from activities of bank, for purpose of establishing RICO violation; (2) debtors were limited to single recovery of $18,100.83 for interest overcharge based upon common-law fraud and breach of contract action and were not entitled to damages for alleged RICO violation; and (3) creditor was entitled to award of $1,064,546.23 on its counterclaim, representing amount remaining due on notes less interest overcharge offset of $18,100.83.

Affirmed.

1. Commerce 82.70

Culpable person, for purpose of RICO violation, cannot be the enterprise. 18 U.S.C.A. § 1962(c).

2. Federal Civil Procedure 2610

If facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable party could not arrive at contrary verdict, but jury has in fact rendered such verdict, granting of motion for judgment notwithstanding the verdict is proper.

3. Commerce 82.71

Existence of enterprise is essential element of RICO claim. 18 U.S.C.A. § 1962(c).

4. Commerce 82.71

To establish "association in fact" enterprise for RICO purposes, plaintiffs must show evidence of ongoing organization, formal or informal, and evidence that various associates function as continuing unit; enterprise must be entity separate and apart from pattern of activity in which it engages. 18 U.S.C.A. § 1961(4).

5. Commerce 82.71

Bank, its holding company, and three employees were not associated in any manner apart from activities of bank, for purpose of establishing RICO violation. 18 U.S.C.A. §§ 1961 et. seq., 1961(4), 1962(c).

6. Damages 15

Plaintiffs cannot recover same damages twice, even though recovery is based on two different theories.

7. Damages 15

Debtors were limited to single recovery of $18,100.83 for interest overcharge based upon common-law fraud and breach of contract action, and were not entitled to damages for alleged RICO violation by bank, its holding company, and employees.

8. Costs 173(1)

Debtor was not entitled, under Oklahoma law, to recover attorney fees incurred in breach of contract and common-law fraud cause of action. 12 O.S.1971, § 936.

9. Bills and Notes 534

Creditor was entitled to recover attorney fees in amount of $55,797.96 incurred in collection of promissory note, under Oklahoma law. 15 Okl.St.Ann. § 276.

Philip R. Russ, Law Offices of Philip R. Russ, Amarillo, Tex., for plaintiffs-appellants.

J. Michael Medina, Frederic Dorwart, Tulsa, Okl., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, REAVLEY, and WILLIAMS, Circuit Judges.

PER CURIAM:

Plaintiffs G.M. and E.D. Atkinson obtained a jury verdict in district court awarding them actual damages of $2,899,796.63 against the defendant, Anadarko Bank and Trust Company (Anadarko), for a violation of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(c).[1] The jury found that Anadarko had violated RICO by mailing false and fraudulent statements charging a rate of interest on loans made to plaintiffs in excess of what the parties had agreed on. The jury also found against Anadarko on issues of breach of contract and common law fraud. The district court granted judgment notwithstanding the verdict in regard to finding of a RICO violation, leaving intact the jury findings of common law fraud and breach of contract. In doing so, it reduced plaintiffs' damages to $18,100.83, the difference between the rate of interest wrongly charged and that which should have been charged. This amount was then offset against the amount due Anadarko on the loans it made to plaintiffs. Plaintiffs appeal. We affirm.

[1] This subsection provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

This award was subject to trebling under 18 U.S.C. § 1964(c), which provides that

[a]ny person injured in his business or property by reason of a violation of section 1962 . . . shall recover threefold the damages he sustains . . .

I.

Anadarko agreed in October 1982 to loan plaintiffs money to finance their cattle business. The loans in question were evidenced by the execution of two promissory notes of $1,300,000 and $500,000, respectively. Under this line of credit on these loans, plaintiffs had borrowed a total of $3,458,880.53 as of October 1983. Of this total, they had repaid Anadarko $2,710,268.35 in principal. In October 1983, Anadarko refused to extend further credit to the plaintiffs to finance their cattle business.

[1] In March 1984, plaintiffs filed this lawsuit, alleging civil RICO violations and the charging of usurious interest. Plaintiffs' original complaint alleged that the culpable person, Anadarko Bank, was also the enterprise. The district court correctly noted that the culpable person cannot constitute the enterprise under § 1962(c). *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122-23 (5th Cir. 1986). Plaintiffs amended their complaint to allege an "association in fact" enterprise which was guilty of RICO violations and common law fraud. Anadarko filed a counterclaim, seeking recovery of the amount due on the promissory notes.

The district court reserved judgment on Anadarko's counterclaim and submitted issues covering the alleged RICO violation, common law fraud, and breach of contract to the jury. The jury found in favor of the plaintiffs and awarded them $2,899,796.63 in actual damages for Anadarko's alleged violation of RICO. Specifically, the jury found that Anadarko committed mail fraud by mailing false and fraudulent statements of the interest owed on the two loans.

This miscalculation of interest was due to the fact that Anadarko had charged the Atkinsons a rate of interest based on the local prime rate of the National Bank of Oklahoma City instead of the lower national prime rate, which the promissory notes and loan agreements contemplated. This miscalculation of interest resulted in an overcharge of $18,100.83.

Upon Anadarko's motion for judgment notwithstanding the verdict, the district court first found that the evidence

adduced at trial supported the jury's findings of common law fraud and breach of contract with respect to the mailings of false and fraudulent statements charging the higher interest. The court, however, limited plaintiffs' damages to the interest overcharge of $18,100.83, which was to be offset against the amount due Anadarko on the promissory notes.

The district court then found that the evidence did not support the jury's finding that Anadarko had violated RICO. Specifically, the court found that plaintiffs did not establish that Anadarko Bank, its holding company, Anadarko Bankshares, Inc., and three bank employees — E. Glen Price, Calvin Campbell, and James Decker — constituted an enterprise separate and distinct from the bank itself. Accordingly, it granted Anadarko's motion with respect to the finding of a RICO violation.[2]

Finally, the district court found in favor of Anadarko on its counterclaim, awarding the bank the amount of $1,064,546.23 — the amount due on the notes computed by using the national prime rate less the offset to which plaintiffs were entitled. The court also denied plaintiffs attorney's fees as found by the jury and upheld the jury's award of fees to Anadarko of $55,797.96 incurred in the collection of the notes.

II.

On appeal, the plaintiffs challenge the district court's determination that the evidence did not support a finding of a RICO violation and did not support the award of damages in the amount of $2,899,796.63. They also contest the court's judgment on Anadarko's counterclaim and its decision to award Anadarko attorney's fees and deny them the same.

[2] In reviewing the district court's judgment notwithstanding the verdict, we consider all of the evidence in a light

[2] The district court further noted that, even if there were a RICO violation in this case, the evidence did not support the jury's finding of damages in the amount of $2,899,796.63. Rather, it noted, in such a case damages would be limited to the difference between interest charged and what should have been charged.

most favorable to the party that opposed the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable persons could not arrive at a contrary verdict, the granting of the motion ws proper. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

Plaintiffs contend that the evidence established the existence of an enterprise in the form of an association in fact. They claim that Anadarko Bank, its holding company, and the three employees were an enterprise separate and distinct from Anadarko Bank. They argue that the defendant bank, the holding company, and the three employees conspired to defraud plaintiffs through the use of the mails by charging a rate of interest in excess of the agreed rate.

[3,4] The existence of an enterprise is an essential element of RICO claim. 18 U.S.C. § 1962(c); *Sedima v. Imrex Co.*,—— U.S.——, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985). To establish an "association in fact" enterprise under 18 U.S.C. § 1961(4)[3] plaintiffs must show "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981); *Shaffer v. Williams*, 794 F.2d 1030, 1032 (5th Cir. 1986). The enterprise must be an "entity separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583, 101 S.Ct. at 2529.

[5] The record here contains no evidence that the bank, its holding company, and the three employees were associated in any manner apart from the activities of the bank. Plaintiffs wholly failed to establish the existence of any entity separate and apart from the bank. In this case, the alleged racketeering activity forming the predicate of the RICO charge ws mail fraud — the mailing of false statements requesting payment of interest in excess of the agreed amount. The mailing of

[3] (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and *any union or group of individuals associated in fact although not a legal entity;* . . . [emphasis added]

loan statements was an activity of the bank. There is no evidence of any other activity on the part of the alleged enterprise.

In addition, there was no evidence presented that the five associates functioned as a continuing unit or formed an ongoing association. No connection was shown between the three individuals and the holding company. The only fact implicating the holding company in the alleged association was its purchase of shares of plaintiffs' notes from the bank. Reasonable jurors could not have found the existence of an enterprise separate and apart from the bank. The district court correctly set aside the jury's finding of a RICO violation.

Plaintiffs assert in their brief that Anadarko breached an agreement to charge interest on the basis of a 365-day year by charging interest calculated on a 360-day year. The jury, however, found against plaintiffs on this issue, and plaintiffs do not contest that finding on appeal.

[6,7] Plaintiffs also argue that the damages for Anadarko's common law fraud the breach of contract should not have been limited to $18,100.83. Plaintiffs cannot recover the same damages twice, even though recovery is based on two different theories. *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1171 (5th Cir. 1984). Plaintiffs further suggest that they are entitled to the $2,899,796.63 jury verdict for Anadarko's breach of contract and common law fraud. These damages, however, were only for the alleged RICO violation. There was no evidence of any other injury to plaintiffs' property or business caused by the breach of contract or the common law fraud. The district court correctly held that plaintiffs are limited to a single recovery of $18,100.83.[4]

[4] Plaintiffs dispute the district court's observation that, even if plaintiffs had successfully established a RICO violation, actual damages would still be limited to the interest overcharge of $18,100.83. Plaintiffs submit that the court based its reasoning solely on the fact that there was no RICO violation. This contention is not well taken. The court correctly noted that the only damages arising from the commission of the predicate act of the mail fraud was the interest overcharge. Plaintiffs' complaint sought only the trebled difference between the interest they paid and what they should have paid, and there was no evidence of other injury to plaintiffs' property or business proximately caused by the mailings of the interest overcharges. In any event, because there was no RICO violation, there could be no RICO damages.

Plaintiffs ask this court to set aside the district court's judgment in favor of Anadarko on its counterclaim. Plaintiffs submit that the findings of common law fraud and breach of contract should prevent Anadarko from recovering the amount due on the notes. They claim they were induced to enter into the loan agreements by Anadarko's promise of a five-year loan commitment. This issue was neither raised in the pleadings nor submitted to the jury. The only part of the transaction which was found to be improper was that the loans would carry an interest rate slightly lower than the interest rate which was actually charged. Anadarko disputed that this was the agreement, but the jury permissibly resolved this issue, against Anadarko. It significance as an inducement to the overall transaction is *de minimis*. The court's judgment on Anadarko's counterclaim awarded Anadarko $1,064,546.23, which correctly presented the amount due on the notes less the overcharge offset of $18,100.83.

Finally, plaintiffs challenge the district court's adjudication regarding attorney's fees. The jury awarded plaintiffs attorney's fees of $21,176.65 and awarded Anadarko $55,797.96 in fees. Plaintiffs ask this court to readjust their fees upward and deny Anadarko any fee recovery because of its alleged RICO violation, breach of contract, and common law fraud.

[8,9] The district court correctly held that plaintiffs are not entitled to recover attorney's fees under Oklahoma law, which the notes agree will provide the governing law. Oklahoma law states that attorney's fees are not recoverable for breach of contract or common law fraud causes of action. Okla.Stat. tit. 12, § 936. Anadarko, on the other hand, is entitled to recover attorney's fees in the amount of $55,797.96, as found by the jury, incurred in the collection of the note. Okla.Stat. tit. 15, § 276.

III.

The district court correctly set aside the jury's verdict because the evidence did not support a finding of a RICO violation. The record contains no evidence that Anadarko Bank, Anadarko Bankshares, and the three employees were an "association in fact" enterprise separate and distinct from the bank. The court correctly limited plaintiffs to a single recovery of $18,100.83 for the interest overcharge. These were the only damages supported by the evidence. The court correctly awarded Anadarko recovery on the promissory notes, less the offset to which plaintiffs were entitled. Finally, the court correctly denied plaintiffs attorney's fees, but properly entered judgment on the jury's award of fees to Anadarko.

AFFIRMED.

No. 86-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G.M. ATKINSON AND E.D. ATKINSON, INDIVIDUALS, D/B/A LAZY LE CATTLE CO. AND D/B/A/ ATKINSON CATTLE CO., AND VIVIAN ATKINSON, AN INDIVIDUAL,

Petitioners,

v.

ANADARKO BANK & TRUST CO., A STATE BANK,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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No. 86-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G.M. ATKINSON AND E.D. ATKINSON, INDIVIDUALS, D/B/A LAZY LE CATTLE CO. AND D/B/A/ ATKINSON CATTLE CO., AND VIVIAN ATKINSON, AN INDIVIDUAL,

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BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

RESTATED STATEMENT OF THE CASE

The Petitioner's Statement of the Case mischaracterizes the proceedings and issues below.[1] This case presents an instance of a groundless preemptive attack by Petitioners

[1] For example, Petitioners insist on bringing to the Court's attention their allegation that Respondent breached an agreement to charge interest on the basis of a 365 day year rather than calculating interest on the basis of a 360 day year. (Petition, at pp. 3, 7-8). Petitioners then state that the jury returned a verdict in favor of Petitioners, leaving the inference that the jury found for Petitioners on both interest differential and 360 day issues. The facts are, of course, different. The jury returned a verdict in favor of Petitioners only on the interest differential claim, not on the 360 day issue. As the Fifth Circuit below observed:

unable to repay loans obtained from Respondent utilizing a de minimus interest rate question[2] as a pretext. The District Court, while finding the Petitioners liable to repay the loans to Respondent, permitted Petitioners' fraud and RICO claims to go to the jury. The jury returned a verdict of $2,899,796.33 in favor of the Petitioners, but the District Court, on a motion for judgment N.O.V., properly set aside the jury verdict on the RICO claims. The District Court's careful analysis of the RICO issues attempted to be raised by the Petitioner was examined by the United States Court of Appeals for the Fifth Circuit and unanimously affirmed in an opinion appearing at 808 F.2d 438 (5th Cir. 1987), reprinted in Petitioners' Supplemental Appendix.

"Plaintiffs assert in their brief that Anadarko breached an agreement to charge interest on the basis of a 365 day year by charging interest calculated on a 360 day issue. The jury, however, found against plaintiffs on this issue, and plaintiffs do not contest that finding on appeal." (Supp. Appendix at A-7).

[2]The interest differential found by the jury to be in violation of the contract between the parties was created by Respondent's use of First National Bank of Oklahoma City's "local" prime rate, as opposed to that bank's "national prime rate." (See Supp. Appendix at A-4). The District Court found the amount to be $18,100.83 and credited Petitioners with that amount as an offset against Petitioners' $1,082,647.06 note-based liability to Respondent, leaving Respondent with a net judgment against Petitioners of $1,064,546.23. (Supp. Appendix at A-8). As the Fifth Circuit correctly noted, Respondent's error was clearly de minimis (Supp. App. at A-8), especially when the total amount loaned is considered: $3,458,880.53 principal was loaned. (Supp. App. at A-4).

ARGUMENT

The Petition Should Be Denied; This Case Presents No Reason For The Exercise of Certiorari Jurisdiction

The Petition should be denied; this case presents no reason for the exercise of certiorari jurisdiction. Petitioners' irrelevant excursus into the history of RICO construction at least demonstrates that the Fifth Circuit does not bear the statute ill will. (Petition, p.5). The Fifth Circuit's decision below broke no new legal ground. Indeed, the Fifth Circuit's decision is an extensively fact-based opinion, simply determining that Petitioners had failed, evidentially, to demonstrate the existence of the requisite enterprise.

Petitioners' use of the "liberal construction" principle as a talismanic device obscures the real issue: any statute has limits, even RICO. As the Seventh Circuit noted, in a case affirmed by this Court on other grounds:

> "We do not think the general principle of liberal interpretation of RICO can be used to stretch section 1962(c) to reach this situation in the face of the subsection's own limits." *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384, 400 (7th Cir. 1984), aff'd _____ U.S. _____, 105 S. Ct. 3291 (1985).

Petitioners' make four assertions in attempting to justify the exercise of the Court's jurisdiction. None of the four assertions are well taken. When examined, the Petitioners assertions demonstrate only that certiorari is *not* appropriate.

Assertion one: The Fifth Circuit engaged in disparate interpretation of RICO to protect a member of the "establishment." (Petition, pp. 5-6). Nonsense. Any fair reading of the Fifth Circuit's opinion, and the District Court's as well (App., starting at A-35), reveals only that both courts below

applied established law, including this Court's opinion in *United States v. Turkette*, 452 U.S. 576 (1981) to determine whether sufficient evidence was offered at trial by Petitioners to support a jury verdict on RICO. There is no indication in either opinion of hostility toward RICO, nor of a desire to limit RICO to "non-establishment" defendants.

Assertion Two: The issues are not isolated and further development by future decisions in other circuits is unlikely. (Petition, at p.6). Not so. As Petitioners admit, the Eleventh Circuit's decision in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied* 459 U.S. 1183 (1983) is a minority of one. Equally significant are three additional facts: (1) *Hartley* was an early case, the first appellate case on the issue Petitioners now present to this Court, as the Eleventh Circuit noted, (*Id.* 678 F.2d at 988: "None of these cases, nor any others uncovered in our search, have squarely dealt with the issue now before us."); (2) No other appellate decision has followed *Hartley*;[3] and (3) The Eleventh Circuit has not had an opportunity to reassess *Hartley* in the wake of its widespread disapproval.[4]

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[3]The Courts of Appeal for four other circuits have, subsequent to *Hartley*, considered the issue. All four have declined to follow *Hartley*. *See e.g.*,specifically declining to follow *Hartley*, *Bennett v. United States Trust Company*, 770 F.2d 308, 315 (2d Cir. 1985); *Hirsch v. Enright Refining Co., Inc.* 751 F.2d 628, 633-34 (3d Cir. 1984); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122-123 (5th Cir. 1986); *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384, 399-402 (7th Cir. 1984), *aff'd on other grounds*, ____ U.S. ____, 105 S. Ct 3291 (1985).

[4]*Hartley* was premised on the same faulty assumption made by Petitioners, and discussed *infra*: to read "person" as separate from "enterprise" would permit a corrupt corporation to escape punishment. In any event a conflict between circuits no longer automatically creates a cert-worthy case. See Stern & Gressman, *Supreme Court Practice* (5th ed. 1978) at § 4.4.

Assertion Three: The Fifth Circuit's decision permits banks and other establishment figures to "engage in proscribed conduct" and states that "criminal activity is approved behavior so long as it is conducted by bank employees ... " (Petition, at p. 6). Again, nonsense. Petitioners argue that to require differentiation between person and enterprise under § 1962(c) would be to permit a corrupt corporation to evade punishment. The U.S. Court of Appeals for the Seventh Circuit expressly has rejected this argument and explained its fallacy.

There are, within RICO, tensions between competing policies. As the Seventh Circuit analyzed the structure of § 1962, the "tensions between these policies[5] may be resolved sensibly and in accord with the language of section 1962 by reading subsection (c) together with subsection (a)." *Haroco, supra* 747 F.2d at 401. Thus, a corporation-enterprise may be liable, in an appropriate case, as a perpetrator under § 1962(a). *Id.*, 747 F.2d at 402. The "horrible" presented by Petitioners simply does not exist. The "RICO provisions have already taken into account these competing policies in different situations and a careful parsing of section 1962 reveals a sensible balance between these policies." *Id.*, 747 F.2d at 401. In this case, Petitioners elected to sue under § 1962(c), which proved at trial to be a plainly inapplicable part of 1962, not a concern of this Court[6]

---

[5]The policies mentioned by the *Haroco* Court include (a) obtaining relief against the central perpetrator, (b) creating deep pocket liability, and (c) shielding corporations where it appears that the corporation is a passive instrument or even a victim of the racketeering activity. *Id.*, 747 F.2d at 401.

[6]No violation of § 1962(a), (b), or (d) was alleged; none occurred. And, as adjudicated below, the Petitioners' § 1962(c) claim failed as a matter of evidence. (Supp. App. at pp. A-6 & A-7; App. at A-36 & A-37).

Assertion Four: The Fifth Circuit opinion conflicts with decisions other than *Hartley*. Again, not so. Sprinkled throughout Petitioners' brief document are unexplained assertions that various other circuit[7] and Supreme Court[8]

[7]We note that four of the alleged "conflicting" decisions are Fifth Circuit decisions. Two comments are appropriate. First, normally, absent compelling reasons, this Court's past practice has been to not consider a conflict among a circuit's decisions as a basis for granting a writ of certiorari, Stern & Gressman, *Supreme Court Practice* (5th ed. 1978), at § 4.6. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). The conflict is viewed as "an intramural matter." Harlan, *Manning the Dykes*, 13 Record of N.Y.C.B.A. 541, 552 (1958). Second, and equally important, the decisions in fact do not conflict. *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976), simply ruled that an illegitimate business can constitute an enterprise. *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982) held that an allegation that a "group of individuals associated in fact with various corporations" could constitute an enterprise, since § 1961(4)'s definition of enterprise is inclusive, not exclusive. Neither case involved the issue of what evidence is necessary to create an association in fact of a corporation and its employees. In *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), *cert. denied* 437 U.S. 953 (1978) the court based its finding of a "enterprise" on proof very similar to that required by this Court's decision in *Turkette*. The court required and found evidence sufficient to prove the existence of an "association" which furnished a "vehicle for the commission of two or more predicate crimes." The court also required and found evidence sufficient to prove a "thread" tying all of the participants in the enterprise together, being the "desire to make money" and the "purpose" "to profit from crime". *Id.*, 571 F.2d at 898-99, 904. In the present case, however, as the Fifth Circuit observed, in applying *Turkette*, the record was completely devoid of relevant evidence. *United States v. Welch*, 656 F.2d 1039 (5th Cir. 1985), upheld, on evidentiary grounds, convictions of three individuals. The one non-Fifth Circuit case cited, *United States v. Benny*, 786 F.2d 1410 (9th Cir. 1985), involved a ruling that a sole proprietorship employing several people constituted an enterprise separate and independent from the owner, who in the case was the culpable person. The court noted a corporation could not be the enterprise and a person. *(Id.*, 786 F.2d at 1416).

[8]*United States v. Turkette*, 452 U.S. 576 (1981). In *Turkette*, this Court determined that the term "enterprise" as used in RICO encompassed both legitimate and illegitimate enterprises. Nothing in

decisions conflict with the decision below. None of these cases are in fact contradictory to the opinion below; indeed, to the extent relevant, all the other opinions support the Fifth Circuit's decision.

CONCLUSION

For the principal reason that Petitioners have totally failed to demonstrate any justification for this Court's exercise of its certiorari jurisdiction, Petitioners' request must be denied. The Petition for a Writ of Certiorari is without merit. Additionally and importantly, the Fifth Circuit, in a unanimous, non-controversial and well-reasoned opinion, correctly affirmed the District Court's action.

Respectfully submitted,

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the Fifth Circuit opinion below challenges that determination. This Court's criteria for determining an association-in-fact, ongoing organization and functioning as a continuing unit, 452 U.S. at 583, was scrupulously followed by both the District Court and the Court of Appeals in this case. The Fifth Circuit accurately evaluated Petitioners' evidentiary record in light of *Turkette's* standards and found it wanting, unanimously affirming the identical conclusion reached by the District Court.

CERTIFICATE OF SERVICE

This is to certify that I have this day served three (3) copies of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI on the attorney of record by depositing such copies in the United States Mail, postage prepaid, addressed as follows:

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This the 2nd day of June, 1987

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